



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hi-Q Environmental Products Co.
File: B-229683
Date: March 22, 1988

DIGEST

1. Protest filed more than 10 working days after the protester was aware of the basis for protest is untimely.
2. General Accounting Office does not consider protests of contract administration matters as part of its bid protest function.
3. Where the solicitation states that the agency reserves the right to award to the offeror whose "first article," contracted separately, has passed testing, provided that award is most advantageous to the government, price and other factors considered, an award to the low offeror whose article was approved is proper.

DECISION

Hi-Q Environmental Products Co. protests the award of a contract to Science Applications International Corporation (SAIC) under request for proposals (RFP) No. N00612-86-R-0778, issued by the Department of the Navy. The contract is for air particle samplers to be used to detect radioactive particles on nuclear vessels and at other sites.

We dismiss the protest in part and deny it in part.

The solicitation, issued on July 30, 1986, contemplated the award of one or more firm, fixed-price contracts for three first articles, and one or more fixed-price requirements contracts for production units. Firms therefore were to submit two separate offers, one for the first articles and one for the production units. The RFP further specified that award of the production-unit contract would go "to the contractor whose first article has passed," provided such award was most advantageous to the government, price and other factors considered. The Navy reports that it structured the procurement that way so that it could broaden the competitive base for future acquisitions of the air

041633/135353

samplers by awarding as many first-article contracts as possible.^{1/}

The Navy received and evaluated three offers for both the first article units and the production units. Following discussions, best and final offers were received from two offerors, Hi-Q and SAIC, by the December 2 closing date. The Navy awarded contracts for first articles to Hi-Q in the amount of \$28,137 and to SAIC in the amount of \$85,596 on December 19.

Before the June 18, 1987, due date for first articles, both SAIC and Hi-Q submitted requests for approval to use nonstandard parts for the unit's vacuum motor blower. The Navy approved the firms' requests. Both firms submitted first articles to the Navy testing facility by the due date. On September 8, the Navy approved SAIC's first article and notified Hi-Q that its unit was disapproved because of a critical failure concerning the unit's alternating current power source. Due to the urgent need for the air samplers, the Navy, on September 18, awarded a contract to SAIC for the production phase of the procurement for \$1,014,100, and notified Hi-Q of the award on September 23. Hi-Q resubmitted its unit for retesting on October 9, and protested to our Office on November 25 following a November 17 conversation with the Navy during which Hi-Q discovered that the full production contract had been awarded to SAIC.

Hi-Q first protests that the Navy should not have evaluated offers for production units until after all contracted first articles passed testing. This issue is untimely. A protest of other than apparent solicitation improprieties must be filed within 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1987). Hi-Q was aware of the Navy's decision to evaluate offers for production units at the same time it considered offers for first articles on November 21, 1986, when the Navy contract negotiator informed Hi-Q that both offers had been evaluated and that the firm's initial price for the production units was too high to be competitive. Hi-Q did

^{1/} While the RFP called these units "first articles," a "first article" normally is not contracted for separately. Instead, a "first article," as defined in the Federal Acquisition Regulation (FAR), is a preproduction model or sample that is contracted for as part of the overall production-unit contract; after testing and approval, the contractor then proceeds with the production-unit quantities. See FAR Subpart 9.3 (FAC 84-5).

not protest the Navy's action until November 25, 1987, more than 1 year after learning of the Navy's evaluation procedure in that respect.

Hi-Q next challenges the Navy's approval, for both itself and SAIC, of the nonstandard part. This aspect of the protest, however, concerns the administration of the first-article contracts. Our Office does not consider protests of contract administration matters as part of our bid protest function. See 4 C.F.R. § 21.3(f)(1). Moreover, we note that Hi-Q requested and was granted approval for a nonstandard motor blower on June 11, 1987, and submitted a first article utilizing that nonstandard part by the June 18 due date for submission of first articles. Hi-Q thus was aware that a nonstandard motor blower was acceptable to the Navy more than 5 months before it protested that issue to our Office on November 25.

Hi-Q also argues that the award of a contract for production units to SAIC prior to completion of the testing of Hi-Q's first article deprived Hi-Q of a fair evaluation of its offer for production units and allowed the Navy to award based on price rather than on price and technical merit.



We find no fault with the Navy's award to SAIC. As stated above, the solicitation reserved to the Navy the right to award a contract for the production units to the offeror whose first article had passed, and specified price as the only other factor that would be considered in selecting a production-unit contractor. We therefore do not think Hi-Q reasonably could have expected that the production contract award would be based on a qualitative comparison of first articles--the offered samplers just had to pass first article testing.

We also do not think the RFP's suggestion that more than one production-unit contract might be awarded necessarily conferred any right on Hi-Q to a production-unit contract if its offered price was higher than a competitor's. SAIC's first article passed on September 8, and the record shows that the Navy determined on that date that an urgent need existed for the air samplers, so that the production phase of the procurement should be awarded to expedite production and delivery of the items. SAIC's base-year offer for the production units was \$320,865 lower than Hi-Q's, and its offer for the base year and option years was \$525,965 lower. In these circumstances, we see nothing wrong with the award of a contract for the production units to SAIC, the low offeror whose first article had been approved, before completion of Hi-Q's first article testing.

Finally, Hi-Q alleges that the award of the contract to SAIC will result in a higher cost to the Navy, since SAIC's air sampler consists of machined aluminum castings, the molds for which are proprietary and therefore ultimately will prove more expensive. The Navy responds that it has no knowledge that the molds in question are proprietary and that Hi-Q has not presented any evidence to substantiate its allegation. Moreover, the Navy points out, Hi-Q's offer is substantially more costly than SAIC's so that Hi-Q's contention is without basis in fact.

We agree with the Navy. The protester has the burden of submitting evidence beyond mere speculation to substantiate its allegations. Alan Scott Division, United Instrument Corp., B-225963, Mar. 23, 1987, 87-1 CPD ¶ 334. Hi-Q has failed to meet that burden since it has furnished no evidence to support its contention. In addition, it is clear from a comparison of Hi-Q's and SAIC's prices for the production units that SAIC's offer represents a lower cost to the government than does Hi-Q's.

The protest is dismissed in part and denied in part.


 James F. Hinchman
General Counsel